

**TITLE OF THE PAPER: NOMINATION AND HIBAH ISSUES IN MALAYSIAN TAKAFUL
(ISLAMIC INSURANCE) INDUSTRY**

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ABSTRACT

Takaful has been introduced as a replacement for conventional insurance. However, there are still some unresolved issues in Islamic life insurance (family takaful) when the participants choose a person as either nominee or recipient of gift (hibah). In Malaysia, the Shariah Advisory Council (SAC) have come out with the resolution which states that the participants are allowed to choose the nominee or the recipient of hibah, provided that all the requirements must be clearly stated in the contract. However, some of the shariah scholars do not agree with these resolutions and hence, it is suggested to further look at these issues again to bring the fairness and justice to all involved parties.

1. Introduction

The Takaful industry is quite new and currently expanding compared to the conventional insurance industry. There are many issues yet to be resolved. One such issue is the issue of nomination and hibah. The objective of this paper is to look into the issue of nominations and the relevance of Hibah to the nomination in the Takaful industry in Malaysia. The study concludes and proposes some recommendation for certain issues in nominations and Hibah in Takaful Industry.

2. Family Takaful

Family Takaful is an alternative saving scheme of life insurance in accordance with Shari'ah with long term financial objectives. It gives protection to the beneficiaries of the participant financially if any calamity or death happens in the future. The main concern of the family Takaful plan is the distribution of Takaful benefits in the event of the participant's death. Therefore, the participant is required to name a person as a nominee to receive Takaful benefits (Abdullah et al, 2010).

3. Nomination

Nomination is the process of appointing a person or persons to receive the takaful benefits as conferred on the takaful participant by the certificate in the event of the death of the participant (Azman, 2009).

3.1 Purpose of Nomination

The purpose of taking out family takaful policies is to ensure that the loved ones of the participant are financially protected in case of an untimely accident or death of the participant. Nomination is an important process that ensures this purpose is fulfilled as early as possible by allowing the takaful operator to disburse the benefits to the nominated person promptly without the need to wait for probate letters or distribution orders from the court (Ismail, 2009).

3.2 Status of nominee

The major issue regarding nomination is the status of the nominee – whether he is the sole beneficiary or simply an executor. There are two major views regarding the status of nominee. One view holds that the takaful benefits are the wealth of the deceased and hence a part of his estate to be distributed according to Fara'id and thus only his legal heirs can be nominated. The other view holds that the participant can gift the takaful benefits to anybody as a Hibah and hence can nominate anybody (Noor, et al, 2008).

3.3 Nominee as an executor

In the case of *Re Ismail bint Rentah* (1940), where the deceased nominated his daughter to receive his shares in case of his death, the judge decided that although the daughter was nominated it did not mean that she can enjoy the monetary benefits as those benefits formed part of the estate of the deceased and hence should be redistributed according to Islamic laws of Fara'id. In this case the daughter's role is that of an executor (Marican 2007).

The National Council of Muslim Religious Affairs in Malaysia released a Fatwa in 1973 stating that: “Nominees of the funds in Employees Provident, Post Office Savings Bank, Bank, Insurance, and Cooperative Society are in the position of persons who carry out the will of the deceased or the testator. They can receive the money of the deceased from the sources stated to be divided among the persons who are entitled according to the Muslim Law of Inheritance.”

Takaful Act 1984 does not provide any express rule on nomination, section 65(1) of the Act requires the operators to distribute the savings and takaful benefits as predetermined by the participant. Section 65(1) states that: “When a participant, in relation to any family solidarity certificate or solidarity certificates, dies and on his death takaful benefits are payable under the certificate or certificates, the operator may make payment to a proper claimant such sum of the solidarity moneys as may be prescribed without the production of any probate or letters of administration and the operator shall be discharged from all liability in respect of the sum paid.”

However, Azman (2009) clarifies that the ‘proper claimant’ as mentioned by the act is not necessarily the nominee as the act goes on to define proper claimant in Section 65(4): “In this section, “proper claimant” means a person who claims to be entitled to the sum in question as executor of the deceased, or who claims to be entitled to that sum under the relevant law.”

However, Section 167 of the Insurance Act 1996, which applies to the Muslim participant, provides that the nominee in a policy will be treated as a mere executor and not as a sole beneficiary over the benefits of the policy. Moreover, the benefits over the policy will be regarded as part of the estate of the participant and will also be subject to his (the participant) debts. Bank Negara Malaysia leaves the status of the nominees up to the Takaful operators, and the majority of the takaful operators in Malaysia prefer to follow the view that the nominee is simply an executor. Table 1 shows the status of nominee as practiced by Takaful operators in Malaysia.

Table 1: Nomination in practice

Takaful Operator	Nomination	
	Muslim Participants	Non-Muslim Participants
Syarikat Takaful Malaysia Berhad	No clarification on the distribution of the takaful Benefits.	✓
Takaful Ikhlas Sdn. Bhd. Hong Leong Tokio Marine Takaful	The nominee is responsible to distribute the Takaful benefits to the legal heirs in accordance with the Islamic law of inheritance (faraid). Subject to Section 65 of the Takaful Act 1984 and any order from the Shariah courts.	The takaful benefits shall be distributed to the nominees upon certain percentage of shares provided in the nomination form.
CIMB Aviva Takaful	No clarification on the distribution of the Takaful benefits. The notes on trust provided in general terms.	✓
Etika Takaful Berhad Prudential BSN Takaful Berhad MAA Takaful Berhad	The nominee is responsible to distribute the takaful benefits to the legal heirs in accordance with the Islamic law of inheritance (far aid). Subject to Section 65 of the Takaful Act 1984 and any order from the Shariah courts.	The nominees shall receive the takaful benefits according to the percentage of shares provided in the proposal form which is subject to the Distribution Act 1958.
HSBC Amanah Takaful (Malaysia) Berhad	The nominee is responsible to distribute the Takaful benefits to the legal heirs in accordance with the Islamic law of inheritance (far aid). Subject to Section 65 of the Takaful Act 1984 and any order from the Shariah courts.	Appointment of the trustee on behalf of the beneficiaries upon the trust created. The trustee shall carry out the responsibility to distribute the Takaful benefits to the beneficiaries named.

3.4 Nominee as a Sole Beneficiary

While in the Re Ismail bint Rentah (1940) case, it was decided that nominee is simply an executor, in other cases such as Re Man bin Mihat (1965) and Re Bahadun bin Haji Hassan (1974), the judge ruled that the participant had gifted the benefits to the nominee hence it is his to be enjoyed as the sole beneficiary.

Bank Negara Malaysia's Sharia Advisory Council issued a resolution saying that the takaful benefits can be given away as Hibah. The resolution gives the final decision up to the takaful operators and goes on to say that the nomination form has to be standardized and the status of the nominee whether as a beneficiary or an executor has to be clearly stated. The participants should be clearly informed of the effect of each option and the eventual distribution of benefits should be based on the contract.

3.5 Proposed Solution

The resolution of the Sharia Advisory Council seems to offer the best practice for the issue of nomination by leaving it to the Takaful operators and with the requirement of clearly specifying the status of the nominee in the nomination form. However as to the sharia compliance of both these solutions, opinions differ and further research is needed to find a solution which would remove these divergent of opinions.

4. Hibah

Hibah can be defined as "a voluntary contract that results in uncompensated ownership transfer between living individuals". In other words, it can be referred to as giving ownership of one's property to another without any rewards in return.

4.1 Application of Hibah in Family Takaful

The concept of Hibah is practiced in the family Takaful products offered by some of the Takaful operators. Takaful Ikhlas is the first Takaful operator to provide in its family Takaful plan a form for Hibah. The participant can give away the Takaful benefits as a form of Hibah in the event of the death of the participant. The takaful operator gives the freedom to the participant to make Hibah as Takaful benefits are the right of the participant.

The table below shows the implementation of Hibah in Family Takaful by the Takaful operators.

Table 2: Implementation of Hibah in Family Takaful

Name of Takaful Operator	Hibah
✓ Syarikat Takaful Malaysia Berhad ✓ MAA Takaful Berhad	No requirement on the proposed recipients provided
✓ HSBC Amanah Takaful (Malaysia) Berhad ✓ Takaful Ikhlas Sdn. Berhad.	The proposed Hibah recipients should be the legal spouse, parent, sibling and/or children only
✓ Hong Leong Tokio Marine Takaful ✓ Etiqa Takaful Berhad ✓ Prudential BSN Takaful Berhad	Hibah letter is not provided This means hibah is not practiced in these companies.

In practice, the application of Hibah in Takaful products leads to an issue. The issue arises between the legal heirs and the donee regarding the Takaful benefit. The reason may be due to lack of knowledge on the application of the concept of Hibah. There are different opinions regarding the application of Hibah in nomination. It can be best understood by looking into some of the issues in hibah.

4.2 Issues in Hibah

4.2.1. Against the Nature of Hibah.

According to Islamic concept of hibah, gifts can be given during the lifetime of an individual. But in family Takaful, the Takaful benefits are given as a gift if the policy holder dies before the maturity. Thus, it goes against the nature of hibah itself (Noor et al., 2008). Another point to be noted is that if Takaful benefit is distributed after the death of the participant, it must be done with subject to certain conditions. They are:

- The distribution of estate must not surpass one-third of the estate minus the expenses and debts.
- The distribution of estate after the death is considered as wassiyah and not as hibah.

4.2.2. Ownership & Evasion of Fara'id

Regarding the money in the Participant Account, when a participant dies, it is part of his estate. However, with regard to the money payable by the takaful operator taken from the Special Participant Account is still questionable. The reason being the participant does not own the money in this fund. Also the participant does not own the takaful benefit during his lifetime but the ownership of the takaful benefit is transferred to the donee after the death of the participant. But based on the opinion of the Jurists, any property that was not owned by the deceased during his lifetime must be distributed according to the Islamic law of Inheritance (Fara'id) (Noor et al., 2008). As hibah cannot be implemented after death, some Jurists believe it is a tactic to avoid the Islamic Law of Inheritance and therefore it contradicts the Quran.

4.2.3. No Ruling on Hibah in the Takaful Act 1984

Currently, there is no ruling mentioned in the Takaful Act 1984 regarding the application of hibah in Takaful. This leads to many problems with regard to practicing hibah. These individuals are parents, husband or wife, children and siblings.

4.3. Implications and Conclusion

There are many unsettled shariah and legal issues pertaining to hibah. There are two ways of looking into these issues. To be critical, the application of hibah seems to violate the nature of hibah itself as discussed above. These issues can be resolved if there is a clear status of nominee as an executor. But the status of nominees in family Takaful is not clearly specified in the contract in terms of responsibility of being an executor or a beneficiary.

Because of these issues, there arises a question as whether the participant is being fair to his legal heirs in giving hibah to a special someone. Also there is perception that the participant can use hibah to avoid his responsibilities. For example, hibah can be used to defraud creditors and also it can be used as a tactic to avoid fara'id. Another view is that of The Shariah Advisory Council of Bank Negara Malaysia. It has resolved that, "Takaful benefit can be used for hibah since it is the right of the participants. Therefore, the participants should be allowed to exercise their rights according to their choice as long as it does not contradict with shariah." But again it can be argued otherwise.

According to the Takaful operators that provide the hibah form, the application of hibah is an alternative for a Muslim participant in family Takaful without having to be subject to the Islamic law of inheritance (Fara'id).

Hibah has not yet been implemented in the nomination practice by some takaful operators. The concept of hibah is now being customized to fit the needs of Islamic Banking and Takaful Industry. The application of hibah in the Takaful industry is still new and needs further improvement to make it consistent with shariah.

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